U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

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DATE: **MAY 15 2012** Office: NEBRASKA SERVICE CENTER FILE [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen and motion to reconsider. The AAO will affirm the previous decision of the director and the AAO's dismissal of the appeal dated June 19, 2009. The petition remains denied.

The petitioner is a software development and consultancy firm. It sought to employ the beneficiary permanently in the United States as a software engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).[1] As required by statute, a Form ETA 750,[2] Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the beneficiary did not satisfy the minimum level of education stated on the labor certification. Specifically, the director determined that the beneficiary did not possess a foreign equivalent degree to that of a U.S. bachelor's degree, and denied the petition on July 18, 2007.

On August 16, 2007, former counsel filed an appeal. He asserted that the beneficiary had the requisite educational credentials to qualify for a second preference visa classification. He additionally requested, for the first time on appeal, that "shall the Service establish that the beneficiary cannot qualify for the category petitioned for as a professional with an advanced degree under the second preference category, petitioner requests classification under the third preference category."[3]

The AAO dismissed the appeal on June 19, 2009. It affirmed the director's denial based on the beneficiary's lack of the necessary educational credentials to qualify for an advanced degree professional under the second preference category that was originally selected on the Form I-140 (Part 2, box "d"), which the service center adjudicated as requested. The AAO additionally determined that a request for a different visa classification on appeal will not be entertained for a petition that has already been adjudicated under the visa classification selected by the petitioner on the Form I-140, Immigrant

[1] In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.* Section 203(b)(2) of the Act also includes aliens "who because of their exceptional ability in the sciences, arts or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States." The regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered."

[2] After March 28, 2005, the correct form to apply for labor certification is the Form ETA 9089.

[3] The procedural history of this case is documented in the record and is incorporated herein. Further references to the procedural history will only be made as necessary.

Petition for Alien Worker. The AAO further observed that the representations made relevant to the beneficiary's employment by the petitioner in California and New Jersey were suspect based on the documentation submitted and the petitioner's lack of registration as a foreign company doing business in California.

Current counsel has filed a motion to reopen and motion to reconsider. A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). The regulation at 8 C.F.R. § 103.5(a)(3) provides that a motion to reconsider must offer the reasons for reconsideration and be supported by pertinent legal authority showing that the decision was based on an incorrect application of law or U.S. Citizenship and Immigration Services (USCIS) policy. It must also demonstrate that the decision was incorrect based on the evidence contained in the record at the time of the initial decision. The AAO will accept this filing as a motion to reopen and motion to reconsider, however, for the reasons set forth below, the AAO does not find that the decision to dismiss the appeal should be changed, and affirms its decision of June 19, 2009.

Counsel asserts on motion that the petition should be approved for the third preference visa category, classifying the beneficiary as a skilled worker. Counsel does not assert that the director's conclusion that the petition was ineligible for EB2 visa classification was erroneous. The majority of the supporting documentation submitted on motion is relevant to the petition's asserted eligibility in EB3 visa category.

Counsel maintains that it is not necessary to file a new Form I-140 petition in order to request classification in a different visa classification than originally requested as long as the job offer remains the same. Citing the same, counsel provides a copy of a June 25, 2009, "Questions & Answers" posted by the USCIS Office of Communications (the petitioner's exhibit B), that indicates a petitioner may request "multiple visa classifications." This Q&A, however, makes clear that if a petitioner wants to request classification of a beneficiary under multiple visa preference categories, then it must file a separate Form I-140 petition with the required fee and supporting documents for each visa category. If the visa classification is selected in error, it also directs the petitioner to immediately request a change in visa classification through the USCIS National Customer Service center prior to adjudication. In this case, the record reflects that the petitioner failed to request the service center to change the visa classification at any time prior to the Service Center completing adjudication of the I-140. As noted above, the request to change category was first made on appeal subsequent to the director's denial of the petition requesting adjudication under the EB2 visa category.

Counsel cites no legal authority compelling the AAO to render a decision on a visa classification requested for the first time on appeal.[4] As noted in the AAO's prior decision, it is the petitioner's

[4] There is no provision in statute or regulation that compels United States Citizenship and Immigration Services (USCIS) to readjudicate a petition under a different visa classification in response to a petitioner's request to change it, once the decision has been rendered. A petitioner

burden to select the appropriate visa classification on the Form I-140. The AAO's authority to adjudicate appeals is delegated by the Secretary of the Department of Homeland Security (DHS) pursuant to the authority vested in him through the Homeland Security Act of 2002, Pub.L. 107-296. *See* DHS Delegation Number 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2003).[5] As noted in the AAO's prior decision, while the AAO's *de novo* authority allows it to review a petition without giving deference to the director's decision on the merits of the petition filed under the visa classification selected on the Form I-140, the AAO cannot adjudicate an appeal under a completely different visa classification other than the one designated on the Form I-140.[6] Therefore, the merits of the petition's eligibility for a third preference classification will not be addressed in this decision. As set forth in the AAO's prior decision of June 19, 2009, the petitioner failed to establish that the beneficiary has a "United States baccalaureate degree or a foreign equivalent degree" necessary to qualify for preference visa classification under section 203(b)(2) of the Act as he does not have the minimum level of education required for the equivalent of an advanced degree.[7]

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may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988).

[5] The AAO exercises appellate jurisdiction over the matters described at 8 C.F.R. § 103.1(f)(3)(iii)(as in effect on February 28, 2003), with one exception-petitions for approval of schools under § 214.3 are now the responsibility of Immigration and Customs Enforcement (ICE).

[6] It is noted that in *Brazil Quality Stones, Inc., v. Chertoff,* 286 Fed. Appx. 963 (9th Cir. 2008), the court determined that the AAO was not required to consider, *sua sponte,* whether an alien was eligible for an L-1B visa where the alien's corporation never petitioned USCIS under this classification and did not raise such argument in its appeal to AAO. We are not persuaded by counsel's assertion that this case stands for the opposite proposition that the AAO is obligated to consider the instant petition under an EB3 visa classification where it is requested for the first time on appeal. In *Brazil Quality Stones, Inc,* the court also noted that the corporation had never petitioned the agency to consider the alien under a different classification. Here, at the time the appeal was filed, the petitioner had never filed a Form I-140 requesting an EB3 visa classification. The petition filed had already been adjudicated by the director pursuant to 8 C.F.R. § 103.3 under the EB2 visa classification for an advanced degree professional.

[7] The beneficiary possesses a foreign three-year bachelor's degree from the University of Madras and a certificate of Elective Minors from the National Institute of Information Technology (NIIT) at the Fountain Center in Mumbai, India. The evaluations in the record both conclude that the beneficiary's education only combined in the aggregate would be the "equivalent" to a U.S. baccalaureate. The education individually or combined would not constitute the foreign equivalent of a U.S. bachelor's degree to qualify for the advanced degree category. One of the evaluators is a member of the American Association of Collegiate Registrars and Admissions Officer (AACRAO) and the other references their published materials. The AAO noted the lack of evidence that NIIT requires a baccalaureate for admission or that it is AICTE accredited. The AAO further advised that it had also reviewed AACRAO's Project for International Education Research (PIER) publications: the *P.I.E.R. World Education Series India: A Special Report on the Higher Education System and Guide to the Academic Placement of Students in Educational Institutions in the United States* 46, 79 (1997), and the materials advised that "NIIT diplomas are primarily vocational and technical

It is additionally noted that in response to the AAO's concerns about the beneficiary's employment by the petitioner in California and New Jersey relevant to the *bona fides* of the job offer, the petitioner has submitted on motion:

(1) copies of the petitioner's first quarter 2009 state quarterly wage records reflecting two employees in California for the first two months of the quarter and five employees in New Jersey for the first two months of the quarter. None of the employees are identified;

(2) copies of three invoices, dated October 7, 2003, October 20, 2003, and November 3, 2003, from the petitioner to [redacted] Pittsburgh, Pennsylvania relevant to the beneficiary's services. Two of the invoices refer to the beneficiary's services performed from October 1 to October 15 and from October 16, 2003 to October 31, 2003, respectively. The third invoice does not reference a date of performance. The total amount billed on the three invoices is $8,550, which is far less than the wages reflected on the beneficiary's 2003 W-2 issued by the petitioner. No location designating the place of performance is shown, so whether these services were performed in California, New Jersey or Pennsylvania is not clear. It is noted that the beneficiary's 2003 W-2 reflects $35,091 in wages paid and only Pennsylvania as the state in which income tax was paid. No contract between Consulting Professional Resources and the petitioner that mentions the beneficiary has been provided;

(3) a copy of a purchase order executed May 14, 2003 between [redacted] and [redacted] which mentions the beneficiary's services to be provided by [redacted] but does not contain any mention of the petitioner or the place of performance;

(4) a copy of a letter, dated July 10, 2009, signed by [redacted] San Jose, California, claiming that the beneficiary's services were provided by the petitioner to [redacted]" who in turn used his services for [redacted] client, Wells Fargo in San Francisco from July 31, 2001 to November 30, 2001. The beneficiary's 2001 W-2 reflects wages of $33,789.48 paid by the petitioner and state income tax paid to California. Although [redacted] refers to the petitioner's provision of the beneficiary's services, no contract between the petitioner and [redacted] has been provided. It is noted that the record contains no contract between the petitioner and any client, which refers to the provision of the beneficiary's services. The evidence provided on motion does not completely address the concerns raised by the AAO in its prior decision relevant to the petitioner's direct employment of the beneficiary in New Jersey and California and the *bona fides* of the job offer.[8] Notwithstanding this observation

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qualifications that do not require a three-year baccalaureate for admission." Counsel's response does not challenge any of the above conclusions and does not include evidence that NIIT either requires a baccalaureate for admission or is AICTE accredited.

[8] If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date is clear. Although not raised by the director, these factors call into question the true nature of the beneficiary's role with the petitioner, the *bona fides* of the job offer and the veracity of information contained within the filing.

and as noted above, the AAO also reaffirms its dismissal of the appeal based on the petitioner's failure to establish that the beneficiary possesses the requisite educational credentials for an advanced degree professional pursuant to section 203(b)(2) of the Act and will also not adjudicate a request for a third preference skilled worker pursuant to section 203(b)(3)(A) of the Act, which has been requested for the first time on appeal in this proceeding.[9]

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[9] Although not a basis for this decision or of the AAO's dismissal of the appeal, it is additionally observed that according to USCIS electronic records, the petitioner has filed a large volume of petitions (over 500), including more than 50 immigrant petitions, although the petitioner states that it only employs 45 total workers on Form I-140. It is not clear that it has established its continuing financial ability to pay the proffered wage of $78,527 as of the April 8, 2002 priority date. Where multiple beneficiaries are sponsored, a petitioner is obligated to show that it has sufficient funds to pay the proffered wages to all the sponsored beneficiaries from their respective priority dates in accordance with the regulation at 8 C.F.R. § 204.5(g)(2). Further, the petitioner would be obligated to pay each H-1B petition beneficiary the prevailing wage in accordance with DOL regulations, and the labor condition application certified with each H-1B petition. *See* 20 C.F.R. § 655.715. Additionally, as noted above, the regulation at 8 C.F.R. § 204.5(g)(2) requires that the petitioner demonstrate its continuing ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. This would cover not only pending petitions, but where petitions that have been approved, plus permanent residence has not yet been obtained as of each respective priority date.

Given the high numbers of petitions filed, and the lack of information related to other sponsored workers' proffered wages from which to calculate whether the same set of financials can accommodate all sponsored beneficiaries for relevant petitions during that same time period, the record is unclear as to whether the petitioner's ability to pay has been established. It is additionally noted that the beneficiary's W-2s reflect that his receipt of wages from the petitioner was $53,040 in 2002; $35,091 in 2003; $48,916 in 2004; $50,455.14 in 2004; $50,455.14 in 2005; $47,522.40 in 2006; $43,986.02 in 2007; and $64,293.78 in 2008. While not obliged to pay the full proffered wage until the Form I-140 is approved, it is noted that it does not appear that the petitioner has fulfilled its H-1B wage obligations to the beneficiary as USCIS electronic records indicate that during a period from October 13, 2003 to June 28, 2008, the non-immigrant worker H-1B wages were designated by the petitioner as $84,000 (EAC03xxx54814, October 13, 2003 to June 28, 2005); $93,000 (EAC05xxx50202, June 29, 2005 to June 28, 2006); $97,187 (WAC06xxx53219, June 29, 2006 to June 28, 2007); and $90,126 (EAC07xxx53988, June 29, 2007 to June 28, 2008).

It is additionally observed that a petitioner must demonstrate that a beneficiary has the necessary education, training experience specified on the labor certification as of the priority date. *See Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Relevant to five years of progressive experience in the specialty following a baccalaureate degree, the regulation at 8 C.F.R. § 204.5(k)(3)(B) requires that a petition for an advanced degree professional be supported by letters from current or former employer(s) showing that the alien has at least five years of progressive post - baccalaureate experience in the specialty. Here, although not a basis for the dismissal of the appeal or the decision on this motion, it is noted that the employment verification letter dated August 13,

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The petitioner's motion to reopen and motion to reconsider is granted. The prior decision of the AAO, dated June 19, 2009 is affirmed. The petition remains denied.

1996 from [redacted] submitted by the petitioner in support of the Form ETA 750's required five years of experience in the job offered as a software engineer or in a related occupation as a computer programmer, programmer analyst or equivalent, failed to specify any title to show either the beneficiary's experience in the job offered or in one of the related occupations. The signature on the letter is not legible and does not identify the author except as a "manager." The letter merely states that the beneficiary worked for the company from February 4, 1994 until February 12, 1996 and states that the beneficiary "had opportunities to work in the computer besides looking after the company accounts." A second letter from [redacted] is dated January 29, 1999 and states that the beneficiary has been employed since September 21, 1998, and could represent only 4 months of experience. A third letter from [redacted] shows only one year of experience. These letters do not sufficiently support the beneficiary's required five years of experience gained in the job offered or one of the related occupations or equivalent. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).